

STATE OF MICHIGAN
COURT OF APPEALS

BARRY F. POOL and SUSAN S. POOL,

Plaintiffs/Counter-Defendants-
Appellees,

v

JOSEPH S. LAUER and MAXINE L. LAUER,

Defendants/Counter-Plaintiffs-
Appellants,

and

SARAH A. SALTER,

Defendant/Counter-Plaintiff.

UNPUBLISHED
September 16, 2010

No. 291339
Oakland Circuit Court
LC No. 07-086362-CE

BARRY F. POOL and SUSAN S. POOL,

Plaintiffs/Counter-Defendants-
Appellees,

v

JOSEPH S. LAUER and MAXINE L. LAUER,

Defendants/Counter-Plaintiffs,

and

SARAH A. SALTER,

Defendant/Counter-Plaintiff-
Appellant.

No. 291670
Oakland Circuit Court
LC No. 07-086362-CE

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

This dispute centers on the character and scope of an express easement. While the parties concur that the deed language grants an easement, the Pools contend that the easement is limited to a right of way and lake access, not the grant of littoral rights. The Lauers and Salter argue that the deed language conveys two separate and distinctive rights, which include both a right of access and littoral rights. We reverse and remand to the trial court for further factual development.

The parties are all owners of part of Lot 93 in the Silver Beach subdivision, which lies between Loon Lake and Silver Lake. The subdivision lots were platted in 1914 and Lot 93, which does not have lake frontage, was initially designated as a clubhouse site and originally comprised approximately five acres.¹ The original deed for Lot 93 contained an easement “over Lot 68.” Specifically, the deed to Lot 93 provided:

Also perpetual right of way and right of lake privileges to Silver Lake over lot 68 [of] said subdivision which said right shall run with the land and bind future owners thereof.²

A clubhouse was never erected on Lot 93. At some point, the Lot 93 was subdivided. It is the scope of the easement over Lot 68 granted in the deed to Lot 93 that is at issue.

Lot 68 of the subdivision is situated between Silver Road and fronts Silver Lake. It is one of several lake frontage lots that span the front of Lot 93, but is the only lot referenced in the original deed providing an easement to access Silver Lake from Lot 93. Ownership of Lot 68 has also changed several times from the date of the original platting. The relevant history provided indicates that in 1924, the Silver Lake Land Company conveyed Lot 68, along with three additional lots, to the Bloomfield Hills Land Company. A 1925 indenture split Lot 68 into equal halves with the “east one half” deeded by the Bloomfield Hills Land Company to John Arthur Tillson.³ The 1925 conveyance was “subject to [the] restrictions” of the 1916 deed and specifically provided:

Also right of way and right of lake privileges over lot 68 of said subdivision and lot One and the west 75 feet of lot 27 said subdivision and which rights shall run with the land and bind future owners thereof.

¹ Lot 93 was substantially larger than the remainder of the platted lots, which were approximately 50 to 60 feet in width by 120 to 150 feet in length.

² The same deed contained a similar provision pertaining to an easement for Loon Lake, which states: “Also perpetual right of way and right of lake privileges to Loon Lake over lot One and west seventy-five feet of lot number twenty-seven [of] said subdivision.”

³ Reportedly, Tillson was an officer of both the Bloomfield Hills Land Company and the Silver Lake Land Company.

Three current landowners of Lot 93 are involved in this dispute. In addition to their property interest in part of Lot 93, the Pools own the eastern half of Lot 68 and the adjacent Lot 69. The Lauers own Lots 84 and 85, the western halves of Lots 83 and 86 and the east 45 feet of Lot 93. Salter asserts ownership of the west 165 feet of the east 330 feet of Lot 93. Inexplicably, the Elstons, who currently own the western half of Lot 68, were not involved or joined as parties in the lower court proceedings.

This litigation arose when the Pools sought to move their current residence, which is on their portion of Lot 93, to Lots 69 and 68, placing it closer to the lake. After receiving zoning board approval, the Pools petitioned the lower court for a declaratory ruling to limit the scope of the easement over Lot 68 to only a right of way for access to the water and precluding activities traditionally enjoyed by littoral owners such as sunbathing, docking of boats, picnicking, etc. They also requested the trial court to determine that the movement of their residence from Lot 93 to Lots 69 and 68 did not interfere with use of the easement by other property owners such as the Lauers and Salters. The trial court granted the Pools' request to limit the scope of the easement to an "unrestricted right of access to use of the water" and determined that the easement "does not allow for shoreline or beach privileges, such as lounging, picnicking and sunbathing, or construction of docks, boat hoists, or any permanent mooring of boats." The trial court initially denied the Pools' request for a declaratory ruling pertaining to the movement of their residence on to their portion of Lot 68 stating, "[The Pools] fail to support their request factually or legally . . . giving . . . this Court – the authority to determine that placement of a home on approximately one-half of lot 68 is consistent with and under the scope of the plat's original dedication."⁴ The trial court also specifically found "*that such development on lot 68 would disturb the use and enjoyment of the servient tenendum.*" (Emphasis added.)

Following the submission of additional briefing by the parties, the trial court determined that the easement language of "'over lot 68' does not specifically provide over all of lot 68. Nor does it provide specified footage to be regarded as the easement." Premised on its determination of the limited right of access provided by the easement, the trial court found "that a path of 15 feet width through the center of lot 68 would allow defendants to use their rights over lot 68 and also provide [the Pools] with use of their property and not unreasonably burden [the Pools] as the fee owner." A written order memorializing this ruling was entered.

We are asked on appeal to review these determinations but are precluded by the lack of factual development and the insufficiency of the lower court record. At the outset, any comprehensive review is stymied by the absence of current records and deeds for the properties involved. While we have a deed for Lot 93, which indicates that the restrictions contained therein are to "run with the land and bind future owners," we have no means of ascertaining whether, in the past 94 years and following the subdivision of this parcel, there have been any changes involving the easement language or what the current deeds specifically included or omitted when these parties obtained their ownership rights. Of particular importance and not

⁴ The request of the Lauers and Salter for a permanent injunction regarding construction was also denied.

addressed by the trial court or discernable from the lower court record is any reference to restrictions on use that might be contained in these deeds, with particular reference to Lot 68. Without the current property deeds we lack the ability to ascertain whether waivers or restrictions have been placed on the relevant properties that could impact the easement rights pertaining to Lot 68.

We are also disturbed by the complete absence and lack of participation in the lower court proceedings of the Elstons as owners of the western half of Lot 68. The language contained in the deed to Lot 93 grants an easement “over lot 68.” This grant occurred before Lot 68 was subdivided into two parcels, effectively creating two separate lots, both of which continue to be identified as Lot 68. Logically, any determination delineating the scope of the easement “over lot 68” must consider both of the parcels. Failure to include the Elstons could impose a significant impact and burden on their property rights, without having afforded them the opportunity to protect their interests. The failure of the trial court and parties to include the Elstons in this litigation, given their obvious interest regarding use or access restrictions to Lot 68 is contrary to the recognition that an adjudication affecting rights to real property cannot be made with regard to individuals who are not parties to the suit.⁵

In addition, there is evidence to suggest that other parcels within the platted properties may contain easement language pertaining to Lot 68 that is the same or similar to that included for Lot 93. This concern arises from the presentation by both parties of deeds for other lots that include easements on Lot 68. We cannot ascertain from the available record the number of lots or property owners that may be confronted with similar easement language in their deeds. For instance, the Lauers have presented a 1933 deed pertaining to Lot 31 in the subdivision, which purported to limit the right of way over Lot 68 as follows:

That it is the purpose of THIS INDENTURE, to grant aid right of way for the purposes of egress and ingress to Loon Lake, Scott Lake, and Silver Lake. The right of way to Loon Lake to be over Lot number one (1) the right of way to Silver Lake to be over the middle twenty feet of Lot number sixty-eight (68) and the right of way to Scott Lake shall be over the South ten (10) feet of Lot number eight-five (85) All of which rights of way shall be in common with others who are conveyed the same privilege, to be used only as a foot pass.

The Pools similarly provide evidence of a consent judgment involving the owner of Lot 23 waiving certain rights pertaining to the use of an easement over Lot 68. While the easement language contained in these identified deeds may differ from that found within the deed to Lot 93, these examples highlight our concern that over its prolonged history and subdivision of lots, various property owners in the chain of title may have bargained to expand or contract their property rights. Of particular concern is the existence of any number of unknown and unidentified lot owners whose deeds may contain the same easement language regarding Lot 68. Any decision limiting or constricting the scope of their easement rights without their

⁵ *Capitol S & L Co v Std S & L Ass’n of Detroit*, 264 Mich 550, 553; 250 NW 309 (1933).

involvement or the provision of notice could open the floodgates for further litigation and result in inconsistent rulings or opinions.

It is also impossible to ascertain from the available record whether this same easement language has been interpreted for other plats within this subdivision. On its face, the deed to Lot 93 contains the identical disputed easement language to establish separate means of access over different plats to both Silver Lake and Loon Lake. But we have no information regarding how it has been applied. Evidence of the historical use and interpretation of this language would provide beneficial information and help to assure consistency with any prior rulings that may exist regarding the deed to Lot 93 and deeds to other properties within this subdivision, which contain the same easement language.

We also find the trial court's rulings to be impossible to reconcile and effectuate. The trial court initially seemed to suggest that development of the Pools' half of lot 68 "would disturb the use and enjoyment of the servient tenendum." Yet the trial court ultimately determined that the proposed construction would not impact the property rights of the owners of the easement. The trial court then defined the parameters of the easement "over lot 68" to be "15 feet wide through the center of Lot 68." We have no clue regarding how this width was determined, as we could find no evidence or testimony regarding boat size or transport needs within the lower court record to support or explain this holding. Of greater significance is the fact that the development plans presented by the Pools for Lot 69 and their half of Lot 68 renders any easement "through the center of lot 68" a practical impossibility. The Pools' proposed residence extends to within five feet of the mid-line dissecting the two halves of Lot 68. In other words, the Pools intend to place structures or plantings on their portion of Lot 68 that extend to within feet of the edge of their half of Lot 68. The Pools proposed building plans effectively preclude any easement or access by the other owners of Lot 93 to the lake over their portion of Lot 68. By necessity the easement as delineated by the trial court will run primarily over the western half of Lot 68, the property owned by the Elstons, thereby unfairly burdening their estate and absolving the Pools of any responsibility to comply with the easement language.

We reverse and remand to the trial court for further factual development. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Patrick M. Meter

/s/ Pat M. Donofrio